United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 30, 2007

TO : James F. Small, Acting Regional Director
William Pate, Jr., Regional Attorney
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: American Barricade, Inc. 506-4033-2500
Case 21-CA-37594 506-6050-2500
506-6050-7530
506-6050-7560

The Region submitted this case for advice as to whether a concerted absence from work without advance notice to the Employer, where the Employer would not reasonably know that employees were engaged in a work stoppage, was a protected strike under the Act, and if so, whether the strike was unprotected because it exposed members of the public and other employees to foreseeable safety hazards.

We conclude that the employee absences were not protected under Section 7 of the Act because the employees never communicated to the Employer that they intended to strike, and did not present grievances or demands in connection with their absences, and therefore the Employer should not reasonably have known that the employees were engaged in a concerted work stoppage. Further, we conclude that since the employee absences did not have the Act's protection, it is not necessary to determine whether they were unprotected because they exposed members of the public and other employees to foreseeable safety hazards.

FACTS

American Barricade (the Employer) is engaged in the provision of traffic safety control, safety services and safety devices. The Employer coordinates various road-work projects, including two marathons each year (the Orange County Marathon and the Long Beach Marathon). The Employer employs approximately 10 full-time and regular part-time traffic control employees, drivers, and general laborers who have been represented by the Southern California District Council of Laborers and its Affiliated Locals, Laborers' International Union of North America (the Union) since certification on July 11, 2006.

On December 20, 2006, an employee petition, listing several grievances relating to the Employer's alleged failure to comply with federal and state wage and hour laws, was presented to the Employer's President (Digon). Employees Castro, Acedo and Perez all signed the petition. Digon agreed to meet with the Union and the employees to discuss the matters addressed in the petition and other grievances.

At that meeting, on January 4, 2007,[1] the parties discussed a wide range of topics, including policies for employees taking leave, the long hours employees were working, the Employer's method for assigning work, and the accuracy of employee time cards.[2] According to both the Employer and the Union, there was no discussion of a potential strike or other work stoppage during the meeting. The meeting lasted about four hours and Digon asserts that the Employer left the meeting with the impression that all parties believed the grievances were moving in a positive direction.

Prior to the January 4 meeting, the Employer, Union and employees were all aware that the Employer was under contract to perform services for the Orange County Marathon for the second consecutive year. The marathon was scheduled for January 7, and the Employer was responsible for setting up various race courses, closing intersections on the race courses and necessary side streets, and taking down the race course at the conclusion of the races. Marathons are the largest single-day events that the Employer handles and the Orange County Marathon required over 30 miles of total road closures.

On January 5, Castro, Acedo and Perez exchanged phone calls during which they agreed that they would not show up for their pre-marathon shifts on January 7 because they were tired of the way the Employer was treating them.[3]

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[1] All dates hereafter refer to 2007, unless specified otherwise.

[2] The Employer addressed the payroll grievance by hiring an auditor to review payroll records for the past two years. Following the audit, the Employer distributed 14 checks to current and former employees due to payroll miscalculations.

[3] In his unemployment compensation hearing before the California Employment Development Department, Castro testified that the reason for his absence and "no call" during his January 7 shift was that he did not believe he

Neither Castro, Acedo, nor Perez discussed their planned absences with any other employees or with the Union before failing to report to work on January 7.

The Employer scheduled approximately 20 people to work the marathon, including regular employees, experienced temporary employees and supervisors, and the shifts began at midnight. Of the 12 scheduled regular drivers, only eight reported; Acedo, Castro, Perez, and Gutierrez[4] failed to report to work without calling. Shortly after midnight, the Employer began calling the absent employees, but was unable to reach any of them on their home phones or their Employer-provided cell phones. None of the absent employees contacted the Employer to explain his absence and there was no picketing or other communication between the absentees and the Employer on January 7.

The Employer was unable to hire replacements for the missing workers because the work was scheduled to begin after midnight on a Sunday. Throughout the morning of the marathon, the Employer received calls from the police department and race organizers complaining about cars running through intersections that should have been closed. The marathon work was completed without incident (although late), but the Employer made the decision that those workers who did not show-up for their shifts, ignored their cell phones, and did not call the Employer to explain their absences should be terminated.

On Monday, January 8, the Employer called the absentees and told each of them not to report for work. Perez contacted the Union and told the Union that he, Castro and Acedo had engaged in a work stoppage during the marathon. Union Representative Olvera immediately went to the Employer and presented Digon with a letter stating that Perez, Castro and Acedo were no longer striking "over the Employer's unfair labor practices" and were willing to unconditionally return to work immediately. The Employer asserted that it had no knowledge of any strike or any conditions that were under protest, refused their unconditional offer to return to work, and after discussions with its attorney, terminated them.

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was scheduled to work. This directly contradicts his assertion that he engaged in a collective work stoppage with Acedo and Perez.

[4] Gutierrez called the Employer to quit his job on January 8.

ACTION

We conclude that the employee absences from work were not protected under Section 7 of the Act because the employees never communicated to the Employer that they intended to strike, and did not present any grievances or demands in connection with their absences, and therefore the Employer should not reasonably have known that the employees were engaged in a concerted work stoppage. Further, we conclude that since the employee absences did not have the Act's protection, it is not necessary to determine whether they were unprotected because they exposed members of the public and other employees to foreseeable safety hazards.[5]

It is well settled that employees have the right to engage in concerted activities for the purpose of protesting or seeking the improvement of working conditions.[6] In determining whether concerted action is protected strike activity, the Board has held that, "to be considered a strike, a work stoppage or interruption must be intended to bring pressure on the employer to change its

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[5] See, International Protective Services, 339 NLRB 701, 702 (2003)(guards who walked off posts at multiple federal buildings lost protection of the Act because they "failed to take reasonable precautions to protect the employer's operations from such imminent danger as foreseeably would result from their sudden cessation of work" and specifically designed the walk-off to "compromise the security of the building"); Federal Security, Inc., 318 NLRB 413, 421 (1995), enf. denied, 154 F.3d 751 (7th Cir. 1998)(security guards' walk-off protected because guards gave 2 hour notice and met with the employer, which gave employer a reasonable amount of time to make certain all security posts were covered). Arguably, the concerted absences here placed the general public in imminent and foreseeable danger that runners would be injured by vehicles because intersections were not sufficiently closed to vehicular traffic. On the other hand, it is not clear how significant a risk of such harm was caused by the employees' action. Indeed, because the marathon was not yet underway when the "work stoppage" began, the Employer could have called city authorities or marathon organizers and prevented imminent harm, even if that meant recommending the cancellation of the marathon, and the opportunity to prevent such harm is a factor to consider in determining whether the conduct was protected.

[6] 29 U.S.C. § 157; Washington Aluminum Co., 370 U.S. 9 (1962).

ways."[7] Thus, absences from work are considered to be protected strikes where the employees have a work-related complaint or grievance and they are concertedly withholding their labor in order to secure the employer's remedy of that complaint.[8] In cases involving "sick-outs," an essential element of the analysis that such absences were protected concerted activity is that there was evidence that the "employer knew or had reason to know" that the employees were engaged in a work stoppage to protest specific working conditions.[9]

Here, there is no evidence that the absent employees made any demand to the Employer as an explanation for their absences or as a condition of their resuming work. Without presenting demands or at least notifying the Employer of the reasons for their absences, the employees were not attempting to pressure the Employer to remedy complaints and the Employer had no reason to know that employees were engaged in a concerted work stoppage.

Specifically, despite their claim that they decided to strike the Employer on January 5, a full two days before the marathon, the absentees never contacted the Employer to explain that they planned to strike, and they did not respond to the Employer's multiple attempts to contact them on January 7. The absentees were simply "no shows" and the Employer made a reasonable assumption that they had either quit their jobs or engaged in gross misconduct by not showing up for required assigned shifts. Although the employees had presented the Employer with a list of grievances in December 2006, and those grievances were discussed at the January 4 meeting, there was no discussion of a potential strike if particular conditions weren't met

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[7] The New York State Nurses Association (The Mt. Sinai Hospital), 334 NLRB 798, 800 (2001), citing Empire Steel Mfg. Co., 234 NLRB 530, 532 (1978).

[8] See, e.g., NLRB v. Robertson Industries, 560 F.2d 396, 398-399 (9th Cir. 1976), citing Shelly & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200, 1202-1203 (9th Cir. 1974)).

[9] Safety Kleen Oil Services, 308 NLRB 208, 209 (1992)(employer met with employees and acknowledged they were not sick and that he was aware they were acting concertedly to protest working conditions); See also, Toledo Commutator, 180 NLRB 973, 977-978 (1970)(employer was aware that employees who left facility were engaging in group protest over the lack of response to prior complaints).

and no reason for the Employer to understand that the employees had failed to report for work on January 7 because of the concerns raised at the meeting. Indeed, it was the Employer's impression that the Union was satisfied with progress made at the January 4 meeting. In these circumstances, the Employer should not reasonably have known that the "no shows" were striking, and could not have known how it could end the work stoppage by modifying terms and conditions of employment.

Accordingly, the employee absences were not protected by the Act and the instant charge alleging that the terminations violated Section 8(a)(1) and (3) of the Act should be dismissed, absent withdrawal.

B.J.K